No. 89-817

In The

Supreme Court of the United States

October Term, 1989

SERVICE BUSINESS FORMS INDUSTRIES, INC. and SERVICE COMPUTER FORMS INDUSTRIES, INC.,

Petitioners,

v.

ROBERT I. GREENBERG, ROSE GREENBERG, and MAYNARD GREENBERG, as Co-Trustees of the Mal Greenberg Testamentary Trust,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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This is an action by the holder against the maker of a promissory note containing a "default type" acceleration clause. The sole question presented for review is whether the trial court and Tenth Circuit Court of Appeals correctly interpreted the Uniform Commercial Code good faith requirement of Okla. Stat. tit. 12A, §1-208 (1981) as not applying to "default type" acceleration clauses.

The Respondents, Robert I. Greenberg, Rose Greenberg and Maynard Greenberg, are Co-Trustees of the Mal Greenberg Testamentary Trust (the Trust). On October 29,

1982, they entered into a Stock Redemption Agreement with the Petitioner, Service Computer Forms Industries, Inc. ("Service Computer") presently owned and operated by Carolyn and Laurance Wolfberg. The Wolfbergs are the sister and brother-in-law of Respondent, Robert I. Greenberg.

The parties agreed that the Trust would transfer all the stock shares it owned in Service Computer back to the company for $102,000, with $2,000 paid at closing and the balance to be evidenced by a promissory note. On October 29, 1982, as part of this Stock Redemption Agreement, Petitioner, Service Business Forms Industries, Inc. ("Service Business") executed the $100,000 promissory note fully set forth in Appendix "A". The note provided for annual payments calculated on a twenty-year amortization schedule, with full payment to be made within ten years of the execution date. A "default type" acceleration clause was contained in the note, as follows:

> " . . . *In the event that maker shall default in the performance of any obligation under this note, this note shall, at the option of the Trust, immediately become due and payable,* without presentment, demand, protest or additional notice of any kind, all of which are hereby expressly waived." (Emphasis added)

After execution of the note, there followed a consistent pattern of default in payments to 1986. As a part of negotiations between the parties, Robert I. Greenberg executed a Disclaimer in favor of Service Computer. Greenberg thereby disclaimed any interest he might have in family jewelry, conditioned on payments by Service Business of all past due amounts owing under the note

and upon its timely payment of future annual installments under the amortization schedule.

Service Business did pay $43,231.86 on June 26, 1986, which included a partial payment of the 1986 installment. However, the October 29, 1986, payment was not received. On November 6, 1986, the Respondents sent Petitioner, Service Business, a notice of their intent to accelerate payment of the note, and this action was commenced by the Respondents (holders) against Petitioners (maker) to collect the unpaid principal and interest due.

The trial court entered summary judgment for the Respondents, holding they had an unqualified right to accelerate the debt owed under the note. As a result, the Petitioners' good faith defense was stricken from the pretrial order. Only one issue was presented to the jury, i.e., whether Service Business received full consideration for the Stock Redemption Agreement with the Trust because Robert I. Greenberg allegedly failed to issue a disclaimer of any interest as beneficiary of the Trust. The jury returned a verdict for Greenberg and the Trust.

Petitioner, Service Business, asserted that Respondents did not accelerate the note in good faith under the Uniform Commercial Code (U.C.C.), Okla. Stat. tit. 12A, §1-208 (1981). In its August 17, 1989, Opinion, affirming the trial court, the Tenth Circuit agreed with the trial court's implicit finding that the good faith requirement of Okla. Stat. tit. 12A, §1-208 (1981) does not apply to notes that permit acceleration at the option of the holder upon default by the maker.

In so ruling, the Tenth Circuit Court of Appeals relied on *Knittel v. Security State Bank, Mooreland, Oklahoma*, 593

P.2d 92, 97 (Okla. 1979). That decision upheld a challenged jury instruction which stated that the Okla. Stat. tit. 12A, §1-208 (1981) good faith requirement did not apply to an acceleration of a default clause. Recognizing under *Big Horn Coal Co. v. Commonwealth Edison Co.*, 852 F.2d 1259, 1271 (10th Cir. 1988), that a court must determine whether a challenged jury instruction properly states the applicable law, the Tenth Circuit stated it logically follows that *Knittel* supports the trial court's ruling. This determination was buttressed by the cited holdings of courts in other states which have concluded the U.C.C. good faith requirement is not applicable when the acceleration is based on an event in the debtors' complete control. *Brummund v. First Nat'l Bank*, 656 P.2d 884, 887 (1983) (relying on North Carolina law); *Bowen v. Danna*, 637 S.W.2d 560, 564 (Ark. 1982); *In Re Sutton Invs., Inc.*, 266 S.E.2d 686, 690 (N.C.App. 1980); *Crockett v. First Fed. Sav. & Loan Ass'n.*, 224 S.E.2d 580, 588 (N.C. 1976).

The United States Supreme Court normally defers to the construction of a state statute given it by lower federal courts, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 106 S.Ct. 2794, 86 L.Ed.2d 394 (1985). The reasons are two-fold: (1) to render unnecessary review of their decisions in this respect, and (2) to reflect a belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective states. See *Court v. Ash*, 422 U.S. 66, 73, n.6, 95 S.Ct. 2080, 2085, n.6, 45 L.Ed.2d 26 (1975); *Bishop v. Wood*, 426 U.S. 341, 345-346, 96 S.Ct. 2074, 2077-2078, 48 L.Ed.2d 684 (1976). Exceptions to the rule exist only where there is "plain error," the lower court's view is "clearly wrong" or "unreasonable." *Brockett*, supra, n. 9. See also Wright,

Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction 2d §4036 (1988).

The Respondents submit the Tenth Circuit's characterization of Okla. Stat. tit. 12A, §1-208 (1981), affirming the trial court, was not plain error, clearly erroneous or unreasonable. Here, the Petitioners could have avoided the condition precedent constituting an event of default by complying with the terms of the note and making payments of principal and interest under the 20-year amortization schedule. They failed to do so.

The right to accelerate under the promissory note was conditioned upon an occurrence of a condition within the control of the debtor. The promissory note between the parties in this case did not provide that the holder (Respondents) could accelerate it "at will" or "when they deemed themselves insecure," so-called "insecurity type" acceleration clauses, which under Okla. Stat. tit. 12A, §1-208 (1981) expressly require good faith. Rather, the promissory note in question provides for acceleration only "in the event that maker shall default in the performance of any obligation under this note," a "default type" acceleration clause.

Under the "default type" clause, there is no need for the protection of the good faith requirement. Moreover, the Uniform Commercial Code implicitly allows a default type acceleration clause, since on default a secured party has the right to repossession of the collateral without judicial intervention; the holder must only enumerate the occasions of default.

Admittedly, as recognized in the Court of Appeals' opinion and cases cited therein, equitable grounds could

prevent a "default type" acceleration of maturity, such as accident, mistake, fraud or inequitable or unconscionable conduct of the creditor/holder. Moreover, as codified in Oklahoma, the U.C.C., Okla. Stat. tit. 12A, §1-103 (1981), expressly preserves principles of equity. However, no evidence was presented that Respondents attempted to cause the default in making the installment payments. The default here involved the substance of the parties' written agreement (the promissory note), and "it is implied in every contract that neither party shall do anything which will destroy or injure the other party's right to receive the fruits of the contract." *C.H. Codding & Sons v. Armour and Company,* 404 F.2d 1 (10th Cir. 1968); *Western Natural Gas Co. v. Cities Service Gas Co.,* 507 P.2d 1235 (Okla. 1972).

CONCLUSION

Clearly, the Petitioners have confused the "default type" acceleration clause in the promissory note made by them to Respondents with the "insecurity type" acceleration clause covered by the Uniform Commercial Code, Okla. Stat. tit. 12A §1-208 (1981), and are, therefore, misinterpreting the good faith requirement of that statute to apply to both types of acceleration clauses. The good faith requirement in Okla. Stat. tit. 12A, §1-208 (1981) expressly applies only to a creditor's option to accelerate "at will" or "when he deems himself insecure" or "in words of similar import," i.e., to clauses that place exclusive control in the creditor over the event that will cause acceleration to occur. The promissory note here does not provide such an option, thereby rendering Okla. Stat. tit.

12A, §1-208 (1981) inapplicable. Nor was any evidence presented requiring prevention of the "default type" acceleration clause under equitable principles.

The Petition for Writ of Certiorari is no more than a rehash of the same arguments the Petitioners have made through two lower federal courts despite repeated rulings against them. This Court should not allow itself to become a forum for Laurance Wolfberg's continuing enmity towards his brother-in-law. Petitioners' assertions concerning motive and state of mind are not relevant when good faith is not an issue under the law. Therefore, this Court should defer to the construction of Okla. Stat. tit. 12A, §1-208 (1981) given it by the lower federal courts construing Oklahoma law.

The Respondents respectfully object to the Petition for Certiorari and request the same be denied.

Respectfully submitted,

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APPENDIX A

PROMISSORY NOTE

$100,000 October 29, 1982

For Value Received, the undersigned Maker hereby promises to pay to the order of the **MAL GREENBERG TESTAMENTARY TRUST** ("Trust") at 1850 City National Bank Okc, OK, or at such place as may be designated in writing, the principal sum of One Hundred Thousand Dollars ($100,000), together with interest thereon from the date hereof, at the rate of nine percent (9%) per annum, in legal tender of the United States of America, as follows:

(a) Annual payments of principal and interest to be computed on a twenty-year amortization of the above principal sum;

(b) The full unpaid balance of the principal sum, plus accrued interest thereon, ten (10) years from the date of the note.

The Maker shall have the right at any time and from time to time to prepay the unpaid principal amount of this note in whole or in part without premium or penalty, but with interest accrued to the date of prepayment.

In the event that Maker shall default in the performance of any obligation under this note, this note shall, at the option of the Trust, immediately become due and payable, without presentment, demand, protest or additional notice of any kind, all of which are hereby expressly waived. In such event, the Trust may proceed to collect the unpaid principal balance of the note, plus accrued interest, from the Maker or Guarantor.

In the event an attorney is retained to enforce or collect this Note or any part thereof, the Maker agrees to pay all costs of collection, including a reasonable attorney's fee and costs of all legal proceedings, which amounts may, at the option of the Trust, be added to the principal sum of this note.

MAKER: SERVICE BUSINESS FORMS INDUSTRIES, INC.

/s/ Laurance B. Wolfberg
LAURANCE B. WOLFBERG
Vice-President

ATTEST:

/s/ Carolyn Wolfberg
CAROLYN WOLFBERG
Assistant Secretary

GUARANTOR: _____
LAURANCE B. WOLFBERG